STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 26, 2011
v	Nos. 296990; 297033 Ingham Circuit Court
JAMES LOUIS THELEN, Defendant-Appellant.	LC Nos. 09-001057-FH; 09-001094-FH

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

BECKERING, J. (*concurring*).

I concur in result only. I would hold that the trial court abused its discretion in joining the two charges against defendant for trial pursuant to MCR 6.120(B), but that the joinder constituted harmless error. There was more than enough evidence for the jury to convict defendant of both third-degree fleeing and eluding, MCL 257.602a(3), and resisting and obstructing an officer, MCL 750.81d(1). Because there was so much evidence proving both offenses, it is unlikely the jury convicted defendant because of the improper joinder.

Defendant's fleeing and eluding conviction arose out of an incident on August 18, 2009, when he fled from Officer Candace Hampton in a high speed car chase. Defendant's resisting and obstructing conviction arose out of an incident the following day, when he threw pop on Officer Brian Sweet, who was guarding defendant in the hospital.

A trial court's decision to join charges for trial is reviewed for an abuse of discretion. See *People v Williams*, 483 Mich 226, 234 n 6; 769 NW2d 605 (2009). Whether charges are related is a question of law reviewed de novo on appeal. *Id*. at 231. MCR 6.120(B) provides, in part:

> On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
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> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

(a) the same conduct or transaction, or

(b) a series of connected acts, or

(c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

The majority concludes that the two charges against defendant were properly joined because "evidence regarding the fleeing and eluding offense was necessary to explain how the resisting and obstructing offense occurred" and evidence regarding the resisting and obstructing offense "was clearly relevant to show a pattern of defendant's affirmative disregard of direct police instruction and defiance of police orders which goes directly to defendant's intent to commit fleeing and eluding." I disagree.

Arguably, evidence regarding the fleeing and eluding offense was relevant to explaining the circumstances of the resisting and obstructing offense and establishing that defendant had reason to know Officer Sweet was a police officer performing his duties. See *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010) (stating that the second element of resisting and obstructing requires that "the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties"); *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996) (stating that evidence of other criminal acts is admissible when "one incidentally involves the other or explains the circumstances of the crime"). When defendant threw pop on Officer Sweet, he was under police guard for having fled from Officer Hampton the day before and he was in the hospital as a result of crashing his car and injuring himself while attempting to flee. That said, while evidence regarding the fleeing and eluding offense may have been relevant to the resisting and obstructing case, such evidence was not necessary to the case. The circumstances and elements of the offense could have been established without admitting the details of the August 18, 2009, incident, as discussed *infra*.

Moreover, evidence regarding the resisting and obstructing offense was not relevant to the fleeing and eluding offense. Contrary to the majority's conclusion, the circumstances of the resisting and obstructing offense were not clearly relevant to establishing that defendant was aware he had been ordered to stop by Officer Hampton and refused to obey the order by trying to flee or avoid being caught. See *People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999) (stating that the fourth and fifth elements of fleeing and eluding require that "the defendant must have been aware that he had been ordered to stop," and "must have refused to obey the order by trying to flee from the officer or avoid being caught"). The conduct involved in the fleeing and eluding, i.e., driving quickly, evading capture by Officer Hampton, etc., was not related to the conduct involved in the resisting and obstructing the following day, i.e., striking Officer Sweet with pop to retaliate for having the television remote taken away. The latter events were not necessary or even relevant to explaining the former, nor did the two incidents involve any of the same witnesses. The majority concludes that the evidence was

"clearly relevant to show a pattern of defendant's affirmative disregard of direct police instruction and defiance of police orders which goes directly to defendant's intent to commit fleeing and eluding." But establishing that defendant engaged in "a series of connected acts" under MCR 6.120(B)(1)(b) or "a series of acts constituting parts of a single scheme or plan" under MCR 6.120(B)(1)(c) requires a substantial commonality of evidence, which does not exist in this case. See, e.g., *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003) (holding that severance was not mandatory where the shootings that gave rise to the charges "occurred within a couple hours of each other in the same neighborhood, with the same weapon, and were part of a set of events interspersed with target shooting at various outdoor objects" and the same witnesses testified to the state of mind that was applicable to both charges).[1] Accordingly, I would hold that the trial court abused its discretion in joining the two charges against defendant for trial pursuant to MCR 6.120(B).

That said, in this case, the joinder constituted harmless error. "When this Court reviews preserved nonconstitutional errors, we consider the nature of the error and assess its effect in light of the weight and strength of the untainted evidence." *Williams*, 483 Mich at 231, citing MCL 769.26 and *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999); see also MCR 2.613(A). "A preserved, nonconstitutional error is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative." *Williams*, 483 Mich at 243. In *Williams*, our Supreme Court held "that even if defendant successfully had established that the trial court erred by joining his two cases, any error would be harmless" because "evidence of each charged offense could have been introduced in the other trial under MRE 404(b)." *Williams*, 483 Mich at 243. The Court noted that such a conclusion was "consistent with that of the District of Columbia Court of Appeals, which has stated that 'a misjoinder may be deemed harmless only if all or substantially all of the evidence of one offense would be admissible in a separate trial of the other,'" quoting *Byrd v United States*, 551 A2d 96, 99 (DC, 1988) (citation and quotation marks omitted). But

[1] To the extent the majority concludes that the charges were properly joined because the evidence regarding the resisting and obstructing offense was relevant to establishing that defendant intended to flee and elude, I disagree. First, the proper test for determining if charges may be joined is whether the charges are related under MCR 6.120(B)(1)(a)-(c), not whether the evidence regarding one charge is relevant to establishing the other charge under MRE 401, or whether such evidence could be offered for a proper purpose, such as proving intent, under MRE 404(b) in a trial on the other charge. Further, although evidence of one offense may be relevant to establishing intent to commit another offense if the offenses are of the same general category, see *People v McGhee*, 268 Mich App 600, 611; 709 NW2d 595 (2005), the probative value of the evidence regarding the resisting and obstructing offense in establishing intent to flee and elude is low considering the lack of similarity between the two incidents, even if the offenses could be placed in the same general category. The fact that defendant threw pop at the officer guarding him in anger or retaliation for having a television remote taken away does not demonstrate an intent relevant to defendant's conduct that gave rise to the fleeing and eluding charge. Proffering such evidence is more akin to establishing defendant's character for the purpose of proving action in conformity therewith, rather than establishing intent.

the *Byrd* Court further stated that "misjoinder error may also be deemed harmless when the evidence of guilt presented by the government is overwhelming." *Id*. at 99-100 n 8. Limiting instructions may also avert any actual prejudice a defendant might suffer from misjoinder. See *Williams*, 483 Mich at 244; *Byrd*, 551 A2d at 99-100 n 8.

Here, although I cannot conclude that had the charges been severed for trial, evidence of each would have been admissible at the other trial under MRE 404(b), there was more than enough independent evidence supporting each charge for the jury to convict defendant of both offenses. First, I agree with the majority that there was sufficient evidence to find defendant guilty of fleeing and eluding beyond a reasonable doubt, absent the evidence related to the resisting and obstructing offense. See *Grayer*, 235 Mich App at 741 (listing the elements of fleeing and eluding). Officer Hampton testified that she had been dispatched to go pick up defendant. As she passed defendant's vehicle on the road, defendant made eye contact with her. Officer Hampton, who was uniformed, immediately turned her patrol car around and pursued defendant. She activated her sirens and lights. An eyewitness testified that he observed defendant drive by at a noticeably high rate of speed and that the police cruiser was immediately visible after defendant's car. Before giving up the chase, Officer Hampton accelerated to 70 miles per hour in a 35 mile per hour zone, and even at that speed, defendant was still pulling away from her. Officer Hampton pursued defendant for approximately a mile before discontinuing the chase when the road surface became dirt and she deemed it too dangerous to travel at a high rate of speed, where after she found defendant's car laying on its left side near the first curve on the dirt portion of the road after apparently spinning out. In addition to witness testimony, video from Officer Hampton's on-board camera was admitted at trial and played for the jury.

There was also sufficient independent evidence to convict defendant of resisting and obstructing. The elements required to establish resisting and obstructing are: "(1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties." *Corr*, 287 Mich App at 503. Officer Sweet testified that he was standing guard over defendant in defendant's hospital room. The officer, who was uniformed, instructed defendant to give him the television remote because when he is on duty, he wants control over the room. Defendant refused to give up the remote and was upset when Officer Sweet took it. The officer looked down to work on paperwork and was then struck by defendant's pop. Officer Sweet's testimony was more than sufficient to find defendant guilty of resisting and obstructing beyond a reasonable doubt.

Additionally, the trial court instructed the jury that "the fact that [defendant] is charged with more than one crime is not evidence."

Thus, although the trial court abused its discretion in joining the charges for trial, defendant cannot establish that the joinder more probably than not affected the outcome of the case. The error was harmless. Reversal is not required.

/s/ Jane M. Beckering